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No. 83-18

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

DUN & BRADSTREET, INC.,
v. *Petitioner,*
GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

**BRIEF OF INFORMATION INDUSTRY ASSOCIATION,
AMICUS CURIAE, IN SUPPORT OF REVERSAL**

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**BRIEF OF INFORMATION INDUSTRY ASSOCIATION,
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The Information Industry Association submits this brief as *amicus curiae* in support of Petitioner's claim that the First and Fourteenth Amendments to the Constitution prohibit the award of presumed and punitive damages absent a showing of actual malice. The parties to this action have given their written consent to the filing of this brief pursuant to Rule 36 of the Rules of this Court. Copies of the letters of consent have been filed with the clerk.

INTEREST OF THE AMICUS

The Information Industry Association ("IIA") is a trade association representing approximately 300 information publishers and information service organizations,

including Petitioner. The information industry uses the traditional "media" to provide relatively general information to mass audiences;¹ in addition, it supplies information content to meet more specialized needs, often relying on non-traditional means of distribution.² These specialized services were referred to in the Vermont court's opinion as "non-media" offerings. The threat of uncontrolled punitive and presumed damage awards against "non-media" defendants or "speech of a commercial or economic nature" could restrict the development by IIA's members of improved means of communication and inhibit the free flow of information in our society. Accordingly, IIA has a strong interest in the constitutional principles that may be developed in this case.

IIA members are united by their interest in delivering information content to the public. Information industry companies create, distribute, and manage a wide range of information content, including news, governmental, economic and academic studies, financial and business data, and virtually any other material for which there is sufficient demand. They do so by gathering information, by identifying the relevant and significant data, by organizing them for ready access and use, and by marketing their product to people for whom it has value and significance. This information chain is labor intensive,

¹ This necessarily vague definition of the "media" would include newspapers and magazines of general circulation, radio and television broadcasting, and at least some books, films and recordings.

² The "non-media" companies represented by IIA include periodical and newsletter publishers, news services, database producers, distributors and retailers, business information reporters and researchers, micropublishers, computer manufacturers, telecommunication carriers and microprinters. IIA's membership (and the industry as a whole) varies greatly in size and scope of organization, ranging from major corporations with widely diversified information interests to small companies and individuals who fulfill highly specialized information needs. A list of IIA's members is included in Appendix A, *infra*.

costly, and depends for its success on a constant striving for accuracy because the specific markets served are highly sensitive to error.

The financial reporting service offered by Petitioner is only one of many business services created and provided in essentially the same way. Other providers of financial information disseminate material on such diverse topics as data processing products, commodities markets, technical specifications, exports, court decisions, foreign securities, patents, demographics, engineering materials, and a host of other matters. Petitioner is in the very heart of the business information industry; it creates, processes and markets information on which the vitality and functioning of our economy depend. While it is one of the best known providers of business information, it uses the same means as other firms in the industry. Thus, as a producer and disseminator of information, it is indistinguishable from other firms in the field.

The information sector uses a great variety of relatively new distribution technologies—including computer databases, microfilm, data communications, electronic mail, and specialized radio techniques—as well as traditional means of distribution, such as books, magazines, newspapers, and mail. The consumers served by these services vary from individuals receiving customized research reports, through specialized audiences interested in narrowly defined subjects, to larger audiences which desire more efficient access to general information.³

³ For example, one IIA member (Occupational Health Services) offers an electronic database with comprehensive data on hazardous substances. Another (Mead Data Central's "NEXIS") provides full-text access via computer to newspapers, magazines, news wires, and general reference materials, which are also published in traditional or paper formats. Finally, The Bureau of National Affairs, Inc. (BNA) offers a daily newsletter (delivered to subscribers by mail and also published electronically) which addresses government policies affecting business.

The "non-media" services have emerged, in part, because the traditional mass media cannot satisfy all of the information needs of our society in an acceptably efficient manner. By their very nature, the mass media must screen out information that is not relevant to a large, diverse audience (*i.e.*, they often provide information keyed to the "lowest common denominator" of their customers). Moreover, the mass media can only present information in standardized formats, and they must deliver information according to the demands and schedules of mass publication.

In contrast, the "non-media"—by taking advantage of modern technological developments in computers, communications and other areas—can create information and transmit it to those who need it more economically, more rapidly, more selectively, and more comprehensively than the mass media. For example, some IIA members make available exactly the same information content as a daily newspaper or general magazine, but in computer database form. This enables the database audience to retrieve only those items that are of particular interest, and to obtain them almost instantaneously without extensive research time.⁴ Other IIA members supply their customers with customized studies and analyses based on specially tailored research into existing information sources. Still other IIA members give users shared access to vast data files at affordable prices through the use of computer or microprinting technologies.

The value of these specialized services to users is reflected in the size and projected growth of the information industry. According to one recent study, the U.S. information content industry (not including the broadcast media or magazine, newspaper, or book publishing) was \$13.6 billion business in 1982. A.C. Nielsen, *The Business of Information 1983* 10 (1983). Projected industry

⁴ For instance, continuously updated information is available through selective dissemination of information ("SDI") services, which are, in essence, electronic "clipping" services.

growth is about 14 percent each year through 1987. *Id.* at 19.⁵

One sector of the information industry with great potential is electronic publishing, including interactive videotex. This medium allows a user to read pages of text (often with illustrations) on a computer terminal, or even on a television set or other low-cost screen when connected to a home computer. The user can choose the precise information desired at the push of a button, commanding the central computer of the electronic publisher to search its vast memory for the requested data, including information similar to that available in a general newspaper such as "news, business and financial reports, editorials, columns, sports, features, and electronic advertising." *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131, 181 n.208 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 103 S. Ct. 1240 (1983). The computer will transmit the selected pages to the user over a variety of media (*e.g.*, telephone lines, unused portions of television signals or cable TV channels) depending on which particular system is used. See generally R. Neustadt, *The Birth of Electronic Publishing* 5-24 (1982).

Because electronic publishing permits direct delivery of accurate and continuously undatable information, it has already become a \$3.2 billion business. *Business Week*, June 11, 1984, at 86. The importance of this new field to the issue at hand cannot be overstated. Indeed, many experts believe it represents the media of the future. As one author has noted:

A new mass medium is emerging in America. Until recently, mass distribution of information has been dominated by publishing and broadcasting.

⁵ The export of information goods and services also contributes billions of dollars to the U.S. balance of trade. See Rubin & Mapp, *Selected Roles of Information Goods and Services in the U.S. National Economy*, in *Information Economics and Policy in the United States* 33 (M. Rubin ed. 1983).

Now, technology is marrying these media to spawn a new one: electronic publishing. Print-type information—text and graphics—is being distributed over electronic channels: television, radio, cable TV and telephone wires. [Since 1978,] electronic publishing has changed from futuristic fantasy into serious business. In time, this technology may change the way we create, obtain and use information.

R. Neustadt, *supra* page 5, at 1. As District Judge Harold Greene stated, “it is not at all inconceivable that electronic publishing, with its speed and convenience will eventually overshadow the more traditional media.” *United States v. AT&T*, 552 F. Supp. at 184. The advent of personal computers in the home and microprocessor technology in the workplace demonstrates that new information services are already beginning to alter fundamentally the way Americans receive information content.

Notwithstanding the impressive contribution of the information sector to date, the information age has only just begun. As Judge Greene has found, “[t]he electronic publishing industry is still in its infancy.” *Id.* at 182. The information industry is composed of a multiplicity of small and medium-sized firms and, in 1983, the median company had only 42 employees and total revenues of under \$700,000. Paine Webber Mitchell Hutchins Inc., *The Information Industry* 8 (1984). Moreover, many such companies are operating at a loss. *Id.* at 9. For these reasons, IIA fears that the increase in diversity of information promised by this nascent industry would be particularly vulnerable to the harsh effects of unlimited punitive and presumed damage awards. These huge judgments—often many times greater than the net worth of an average information industry company—cannot fail to have a harmful chilling effect on the free flow of information from a large number of diverse sources. Accordingly, IIA and its members have a substantial interest in this case.

SUMMARY OF ARGUMENT

No justification exists for the “media/non-media” distinction drawn by the lower court. Freedom of speech and the press are accorded to all citizens equally and there is no constitutional basis for giving less protection to new or different information services than that enjoyed by the traditional mass media. A large and diverse range of “non-media” companies serve the same function in our society as the mass media, making available the same or similar information content, often by identical means. The imposition of unlimited punitive and presumed damage awards on these “non-media” information companies would have the same chilling effect on protected expression as that which the Court has recognized in cases involving traditional media defendants. In addition, the threat of enormous judgments in defamation cases could severely restrict the development of new and diverse information sources.

Furthermore, the lower court erred in its conclusion that there is no constitutional value in speech outside the realm of communication dealing with political and public issues. First Amendment protection is not limited to political expression. The Constitution safeguards a broad range of speech, including discussion of social, economic, artistic, literary and ethical matters. Moreover, while the Court has afforded “commercial speech” a lesser degree of First Amendment protection than some other forms of communication, this doctrine is limited to advertising and related promotional activity. Outside the context of advertising and promotional speech, communication concerning economic and commercial affairs (like speech on other subjects) is fully susceptible to the dangers of self-censorship that could flow from the unrestricted imposition of punitive and presumed damages.

ARGUMENT

I. THE FIRST AND FOURTEENTH AMENDMENTS PRECLUDE THE AWARD OF PRESUMED OR PUNITIVE DAMAGES IN DEFAMATION CASES INVOLVING "NON-MEDIA" DEFENDANTS ABSENT A SHOWING OF ACTUAL MALICE.

A. The Constitutional Rule of *New York Times* and *Gertz* with Respect to Presumed and Punitive Damages Should Apply to All Speakers.

Neither the language of the First Amendment nor this Court's interpretive rulings can support the view that only some classes of speakers are entitled to the protection offered defamation defendants in *New York Times* and *Gertz*. To the contrary, freedom of speech and freedom of the press are "fundamental *personal* rights and liberties." *Lovell v. Griffin*, 303 U.S. 444, 450 (1938) (emphasis added). See *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . ."); *id.* at 802 (Burger, C.J., concurring) ("[T]he First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms.").

More specifically, the right of the mass media to generate and disseminate ideas does not differ from the freedom of the press guaranteed all citizens under the First Amendment. The Court has found that liberty of the press "is not confined to newspapers and periodicals". . . . Almost any author may quite accurately assert that he is contributing to the flow of information to the public" *Branzburg v. Hayes*, 408 U.S. 665, 704-05 (1972) (quoting *Lovell*, 303 U.S. at 452). In fact, freedom of the press is "no greater and no less" . . . than the liberty of every citizen of the Republic." *Bellotti*, 435 U.S. at 801-02 (Burger, C.J., concurring)

(quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)).⁶

Furthermore, the fact that this case involves presumed and punitive damages provides no basis for distinguishing between "media" and "non-media" speakers. Presumed and punitive damage awards were limited in *Gertz* because: (i) unbridled jury discretion over damages inhibits the exercise of First Amendment freedoms;⁷ and (ii) the countervailing state interest in compensating victims of defamatory speech "extends no further than compensation for actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).⁸ The Court drew no

⁶ If this Court were to rule that the "media" are entitled to special treatment with respect to defamation damages, the term "media" would have to be defined to include "every sort of publication which affords a vehicle of information and opinion." *Lovell*, 303 U.S. at 452. Many information companies other than traditional publishers and broadcasters disseminate or "publish" all types of information and opinion, including financial reports. See *infra* note 13 and accompanying text.

To the extent that any form of communication was deemed to be deprived of the protection accorded the "media," the Court would continuously be required to consider in future cases the different levels of protection guaranteed by the "speech" and "press" clauses of the First Amendment. See Stewart, "Or of the Press", 26 *Hastings L.J.* 635 (1975). In this regard, it is significant that one of the foremost representatives of the institutional press finds no basis "for distinguishing between the established press and the lonely pamphleteer in defining the media for purposes of defamation law." Brief of The Washington Post, *Amicus Curiae*, at 22 n.4.

⁷ See also *Smith v. Wade*, 103 S. Ct. 1625, 1641-44 (1983) (Rehnquist, J., dissenting) ("punitive damages [have] been vigorously criticized throughout the Nation's history"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-87 (1971) (Marshall, J., dissenting) (size of punitive judgments could be "fatal" to publishers).

⁸ Contrary to Respondent's claim, a decision for Petitioner would not sound the "death knell of reputational interests of our citizenry." Brief of Respondent at 12. To the contrary, the issue here is a narrow one—whether the states have a legitimate interest in

distinction among types of speakers in *Gertz* and the justifications provided for the limitations on state remedies logically apply with equal force to all speakers.

B. The Lower Court's "Media/Non-Media" Distinction Is Unsound.

Even assuming *arguendo* that a principled reason exists for exposing some, but not all, defamation defendants to uncontrolled liability for presumed and punitive damages, the distinction selected by the Vermont Supreme Court is indefensible. It is difficult to discern the court's rationale for singling out "non-media" entities for lesser protection; indeed, the court did not even offer a definition of "non-media" defendants in its opinion. However, the court apparently assumed that "non-media" companies are distinguishable because they sell specialized information at high prices to "selective, finite audience(s)." *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 417-18 (Vt.), *cert. granted*, 104 S. Ct. 389 (1983), *request for rebriefing*, 104 S. Ct. 1586 (1984).⁹

The information sector, however, is not so easily classified. In fact, there is a wide variety of information companies in today's marketplace (including the traditional press), all of which perform interrelated functions. As demonstrated below, sound distinctions cannot be drawn between these companies based on the fact that their target audiences may be specialized. Furthermore,

guaranteeing defamation plaintiffs judgments in excess of that necessary to compensate them for actual, proven injuries. While there may be a role for the states in securing reputational interests to the extent of actual injury, the First Amendment was crafted expressly to forbid governmental punishment of expression. As demonstrated below, inhibition of "non-media" speakers is just as damaging to First Amendment goals as is the inhibition of the traditional mass media.

⁹ Confusingly, at one point in its opinion, the Vermont court characterized credit agencies as a "type of media." 461 A.2d at 417.

any attempt to draw a line between the traditional media and "non-media" companies would be undermined by the fact that the various speakers use the same means of distributing information content.

1. The Provision of Service to Specialized Audiences Should Not Deprive "Non-Media" Companies of First Amendment Protections.

A "non-media" company should not be penalized simply because it serves a relatively small audience that is willing to pay substantial sums for what often is highly specialized information.¹⁰ While advertising revenues are sufficient to support services for which there is truly a mass market, premium subscription charges may be the only means of financing the production and dissemination of materials that are customized to meet the needs and interests of smaller audiences. In such circumstances, these subscription arrangements directly advance the First Amendment goals of broadening, diversifying and enriching the flow of information to the American people.

The Vermont court's assumption that "non-media" speech may be distinguished on the ground that it is delivered only to select, finite audiences is unfounded. In fact, the audience reach of any given "non-media" service (especially those delivered electronically) is potentially greater than that of many traditional publications. For example, the "Dow Jones News/Retrieval" service is available to 120,000 subscribers, while *American Opinion*, the publication at issue in the *Gertz* case, has a current circulation of 40,000. See IDP Report, February 17,

¹⁰ It is well established that the mere fact that a speaker receives pecuniary compensation does not remove the speech from the ambit of the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

1984, at 3; IMS, *Ayer Directory of Publications* 470 (1984).¹¹

Even to the extent that "non-media" entities provide services that are inherently more specialized or customized than the traditional media, this would not justify the denial of constitutional protection to "non-media" speech. At the time the Bill of Rights was adopted, there was no "mass" media as we know it today. The First Amendment has been properly interpreted to afford equivalent protection to publications ranging from *The New York Times* with a daily circulation of 900,000 in its 133rd year (see *New York Times Co. v. United States*, 403 U.S. 713 (1971)) to "an occasional publication (nine issues) more nearly approximating the product of a pamphleteer than the traditional newspaper." *Bellotti*, 435 U.S. at 801 n.6 (Burger, C.J., concurring) (discussing *Near v. Minnesota*, 283 U.S. 697 (1931)). In short, the mere size of the audience has never defined the appropriate level of First Amendment protection.¹²

2. First Amendment Protection for Speech Should Not Depend on Use of Traditional Means of Distributing Information Content.

No justification exists for granting information companies different degrees of protection against unlimited punitive and presumed damage awards based on whether they use conventional publishing or alternative, non-traditional means to distribute information content. Reports of the alleged bankruptcy of Greenmoss Builders

¹¹ Furthermore, even the traditional media are increasingly gearing their publications to more specialized audiences as evidenced by the trend toward specialty magazines. See *Advertising Age*, Mar. 26, 1984, at M-16.

¹² Removing First Amendment protection from publications with small circulations carries with it the danger of suppressing unpopular minority opinions. Cf. *Edwards v. South Carolina*, 372 U.S. 229, 237-38 (1963).

could have been published in Vermont newspapers, which clearly would have received protection under the *Gertz* rule. Dun & Bradstreet performed the same communicative function and, thus, deserves the same treatment.

Furthermore, it is becoming increasingly common for identical copy to be available through more than one distribution mechanism. For example, Dun & Bradstreet uses both regular mail and electronic delivery systems for the services involved in this case. In addition, the full text of many traditional publications is now provided electronically.¹³

In *Gertz*, this Court established an "equitable boundary" between competing concerns that limited defamation liability to the proven, actual harm. *Gertz*, 418 U.S. at 347-48. It would be entirely unreasonable to safeguard

¹³ Many other IIA member firms compile and distribute general news and public interest information. Perhaps the best known of these services is "NEXIS," which republishes over 60 newspapers, magazines and newsletters (including *The New York Times*, *The Washington Post*, *Time* and *Newsweek*) and currently has 250,000 active users.

With respect to any given subject of expression, there are often both traditional media and "non-media" companies that provide analogous service. For example, Dow Jones & Co. offers an electronic service called "Dow Jones News/Retrieval" that is similar in content to a newspaper's business section. Companies such as Auerbach Publishers, Inc. and Datapro Research Corporation distribute product reviews of electronic equipment—not unlike fully protected product reviews that appear in a newspaper or in *Consumer Reports*. See *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949 (1984).

The information industry also contains companies that list information concerning products and services. For example, Fisher-Stevens' "Physicians' Practice Profile" contains information concerning the prescribing and practice characteristics of 170,000 physicians. At least one court has already held that such information falls within the definition of the constitutionally protected "press." *Health Systems Agency v. Virginia St. Bd. of Medicine*, 424 F. Supp. 267, 272 (E.D. Va. 1976) (directory of factual information about area physicians).

information content when distributed in newsprint form, but to remove *Gertz* protection when the same material is delivered in a non-traditional manner. Much of the traditional publishing industry may "go electronic" within the next few years. See *Presstime*, April 1983, at 16. Obviously, it would be disastrous if the entire body of constitutional protections now afforded defamation defendants were to evaporate with advances in technology.

C. The Threat of Presumed and Punitive Damage Awards Would Limit the Diversity of Information Sources and Inhibit Improvements in Communication Within Our Society.

By subjecting the information industry to potentially huge damage liabilities, affirmance in this case would result in a reduction in the number of information suppliers which, in turn, would inevitably reduce the volume and scope of information available to the public. Moreover, any "media/non-media" distinction could be expected to inhibit the development of technologies designed to facilitate the free flow of information in our society. This constriction of diversity is fundamentally at odds with the First Amendment.

The recent proclivity toward huge jury awards is well known. It represents only the most recent evidence of the inadvisability of non-compensatory and uncontrollable punitive damages. In its earlier brief in the instant case, *The Washington Post* fully documents massive damages awarded against libel defendants. See Brief of The Washington Post at 12-16. A ruling for Respondent in the instant case would be an open invitation to bring such libel actions against the information industry.

Even more than many traditional media companies, the "non-media" information industry is ill-suited to bear such judgments. In this nascent field, the median information company has annual revenues of \$685,000, and is operating at a loss of nearly \$200,000 per year. Paine Webber, *supra* p. 6, at 8. Accordingly, judgments

running into the millions of dollars (as discussed by *The Washington Post*)—or even the \$350,000 presumed and punitive damages at issue here—might bankrupt the median firm in today's information industry. The novel nature of many of these ventures, coupled with untested market conditions, creates substantial inherent risks for potential entrants. These existing risks would be seriously exacerbated by a threat of unlimited punitive and presumed damage judgments.

For these reasons, the imposition of liability absent actual malice for punitive and presumed damages would inevitably reduce the diversity of information sources and, thus, of information content. Yet a key goal of the First Amendment is to promote "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). *Accord FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978). See also *United States v. AT&T*, 552 F. Supp. at 180-86. Thus, potentially unlimited exposure to excessive and destructive damage awards violates a central purpose of the First Amendment.

Moreover, restrictions based on the manner in which information is distributed would tend to inhibit the development of information technology. For example, the trend toward electronic publishing—which is fueled in large measure by an ability to update information rapidly and continuously—could be severely affected if non-traditional publishers were required to subject vast quantities of information to artificially induced and excessive verification procedures:

Unlike most products and services, information in general and news in particular are by definition especially sensitive to even small impediments or delays. Information is only valuable if it is timely; by and large it is virtually worthless if its dissemination is delayed. This quality is especially impor-

tant in electronic publishing because up-to-date information and constant availability are the features likely to be sought by subscribers.

United States v. AT&T, 552 F. Supp. at 182.

In sum, a reduction in the number of information sources and delivery methods would be the inevitable result of the Vermont court's decision. This, in turn, would chill protected expression, and deny to the marketplace of ideas the full benefits of the information sector. Because the First Amendment demands greater protection for expression, the decision below must be reversed.

II. THE MERE FACT THAT SPEECH INVOLVES COMMERCIAL OR ECONOMIC INFORMATION DOES NOT DEPRIVE THE SPEAKER OF FIRST AMENDMENT PROTECTION AGAINST THE UNRESTRICTED IMPOSITION OF PRESUMED OR PUNITIVE DAMAGES.

A. The First Amendment Protects a Wide Range of Expression, Including Speech Related to Commerce and Economics.

Although not precisely articulated, the Vermont court appeared to affirm the award of punitive and presumed damages in this case on the ground that the type of speech involved is unrelated to politics or public issues and, therefore, is not cognizable under the First Amendment. However, the First Amendment clearly protects a broad variety of speech outside the political realm.

Freedom of expression undoubtedly has social utility in contributing to the vitality of the self-governing process. However, it is also recognized that "[t]he First Amendment presupposes that the freedom to speak one's mind is . . . an aspect of individual liberty—and thus a good unto itself" *Bose Corporation v. Consumers Union*, 104 S. Ct. 1949, 1961 (1984). Thus, even though particular attention is sometimes devoted to political speech,

this Court has long acknowledged that the protections of the First Amendment are not limited to political expression:

It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' . . . But our cases have never suggested that expression about *philosophical, social, artistic, economic, literary, or ethical matters*—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

Aboud v. Detroit Board of Education, 431 U.S. 209, 231 (1977) (citations omitted) (emphasis added). See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).¹⁴ Indeed, this Court has declared that:

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all* issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (emphasis added).

Significantly, this Court has specifically affirmed that the freedom to speak or publish extends to words or writings concerning economics and commerce. In *Thornhill*, the Court recognized the First Amendment importance of "[f]ree discussion concerning the conditions of industry and the causes of labor disputes" *Id.* at 103. See also *Thomas v. Collins*, 323 U.S. 516, 531 (1945). More recently, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court found First Amendment protections

¹⁴ Significantly, the Framers viewed freedom of expression as a concept that extends well beyond political information and encompasses "the advancement of truth, science, morality, and the arts in general" 1 *Journals of the Continental Congress 1774-1789* 108 (W. Ford ed. 1904), quoted in *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

to apply in a broader commercial context. Recognizing that an individual's interest in commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate," the Court found that:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Id. at 763, 765 (citations and footnotes omitted).¹⁵

Furthermore, any attempt to differentiate between information industry companies on the basis of the content of their speech would harken back to the type of subjective, case-by-case adjudication of defamation actions that was required under *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).¹⁶ The Court in *Gertz* discarded the *Rosenbloom* "newsworthiness" test because of the

¹⁵ See also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980) ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information").

¹⁶ Because content-based distinctions could lead to the suppression of unpopular—albeit valuable—speech, the Court generally insists that the protections of the First Amendment are content neutral. *Regan v. Time, Inc.*, 52 U.S.L.W. 5084, 5087 (U.S. July 3, 1984) ("Regulations which permit the Government to discriminate

difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not—to determine . . . 'what information is relevant to self-government.' . . . We doubt the wisdom of committing this task to the conscience of judges.

Gertz, 418 U.S. at 346 (quoting *Rosenbloom*, 403 U.S. at 79). Moreover, it is the role of the marketplace of ideas, not the judiciary, to identify truth and value in classes of expression. As stated by Justice Douglas: "[I]f the rough and tumble of debate is the best vehicle for producing approximations of factual truth or preferred opinion, then courts have no business making premature and interim evaluations of contested statements' merits." *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 903 (1971) (Douglas, J., dissenting).

The type of information provided by IIA members includes, *inter alia*, precisely the sort of economic and commercial information that has been recognized by this Court to be subject to First Amendment protection. To burden this speech discriminatorily with the risk of unlimited punitive and presumed damage awards would violate the First Amendment rights of IIA members and other firms in the information industry.

B. The Stringent Forms of Content Regulation that Are Imposed on Commercial Advertising Are Not Applicable to the Dissemination of Economic Information Outside of Advertising or Related Promotional Activity.

Although this Court has accorded "commercial speech" a lesser degree of First Amendment protection than that enjoyed by other forms of communication, it is recognized that this reduced level of protection is not applicable to all speech concerning commercial or economic matters.

on the basis of content be tolerated under the First Amendment"). See also *Bose*, 104 S. Ct. at 1962; *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

Indeed, the dichotomy recognized by the Court is based on "commonsense differences between speech that does 'no more than propose a commercial transaction' . . . and other varieties." *Virginia Pharmacy*, 425 U.S. at 771 n.24 (citation omitted).

Thus, while some advertising and related promotional material may be singled out for special regulatory treatment, the Court has never suggested that the publication of information about economic institutions or activity would generally (*i.e.*, outside of an advertising or promotional context) be subject to such harsh treatment.¹⁷ This is true regardless of whether the reporting or dissemination of such information occurs through the columns of *The Wall Street Journal*, product reviews offered by *Consumer Reports*,¹⁸ or electronic transmissions of business and commercial material from a computer database.

¹⁷ Even if the special restrictions on commercial speech were applicable to all "expression related solely to the economic interests of the speaker and its audience," *Central Hudson*, 447 U.S. at 561, these restrictions would not logically apply to reporting on the activities of a business corporation by a third-party enterprise (traditional or non-traditional) seeking to provide information to its subscribers. Indeed, the speech here has no more relation to the economic interests of Petitioner than the information in the news columns of *The Washington Post* or *Wall Street Journal* has to the economic interests of the publishers of those newspapers.

Examination focused on the speaker's direct economic interests would not void all regulation of economic activity. To the contrary, for example, the offering of securities or corporate proxy statements represents expression in the direct economic interest of the speaker, and may be afforded reduced First Amendment protection. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

¹⁸ See *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949 (1984) (apparently assuming that reviews of products in *Consumer Reports* is speech entitled to protection from liability absent actual malice). Indeed, the *Bose* Court must have assumed that product reviews about stereophonic speakers were within First Amendment protections. IIA sees little difference between the speech about speakers there and the speech about building contractors at issue here.

The fact that the commercial speech doctrine is limited to advertising and promotional activities is underscored when one examines the specific factors that the Court has used to justify carving out a category of speech with limited protection. The "commonsense differences" which were used to distinguish advertising from "other varieties" of speech included its verifiability and its hardness. Specifically, the Court noted that:

The truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

Virginia Pharmacy, 425 U.S. at 771 n.24. While these considerations may be applicable to advertising by a company seeking to sell a product or service, they self-evidently are *not* applicable to the collection, processing and dissemination of economic information by either the traditional mass media or the "non-media."

Furthermore, while some may suggest that advertising can be distinguished by the presence of a tendency to misrepresent, the overriding incentive of the media (either traditional or non-traditional) in reporting on economic or business matters is to develop a reputation for accuracy and reliability. While misstatements of fact can and do occur, there is no basis for assuming that a general disposition to deceive is at the root of the problem. Instead, the obvious "culprit" here, as in other areas of speech, is human error.

The entire body of constitutional law of defamation is premised directly on a recognition that "erroneous state-

ment is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). While the special characteristics of advertising may suggest that such a form of speech would survive, or even prosper, without "breathing space," there is no basis for concluding that this is the case with all forms of communication concerning commercial, business and economic affairs. Indeed, these subjects cannot be distinguished on a principled basis from others—such as politics, art, literature and social mores—that are entitled to a full measure of First Amendment protection.

The inevitable result of underinclusive application of First Amendment protections would be to threaten many "non-media" companies that provide economic information to subscribers, but are simply incapable of shouldering the burden of huge presumed and punitive damages. As noted above, the average information company is quite different from a media conglomerate, and far too small to withstand the type of punitive damage awards that are becoming common in defamation actions. In the interest of self-preservation, information companies probably would adopt an excessively cautious approach to the selection and verification of information to be distributed. It was precisely this type of self-censorship that the Court found intolerable in *New York Times* and *Gertz*. See *Gertz*, 418 U.S. at 340. The threat of severe punishment for error disseminated without actual malice "runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Id.* The Court has already indicated that it is not willing to run that risk. The First Amendment "requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341. In this case, the only protection for falsehood that is sought is to limit damages, in the absence of actual malice, to those actually incurred and proven by plaintiffs.

CONCLUSION

Based on the foregoing, the Information Industry Association, *amicus curiae*, respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and to remand the decision for retrial.

Respectfully submitted,

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July 30, 1984

APPENDIX

APPENDIX A

Information Industry Association Members *

ABC-Clio Information Services
 Academic Press
 Access Innovations, Inc.
 ADMAX
 ADP Network Services Database Services
 AgriData Network
 All America Cables and Radio, Inc. (ITT)
 Alpha Systems Resource
 American Banker
 American Express Interactive Services
 American Express Service Establishment Expansion
 American International Data Search
 Analysis Technology, Inc.
 ARTICULATE
 Aspen Systems Corporation
 AT&T Communications
 AT&T Corporation
 AT&T Information Systems Division
 Auerbach Publishers, Inc. (Int'l Thom)
 AutEx Systems (Xerox)

 base-line SYSTEMS Corporation
 Berul Associates, Limited
 The Berwick Group
 Bibliographic Retrieval Services (ITG)
 Bio Medical Information (SFN)
 BioSciences Information Service
 The Bob Birnbaum Company
 BNA Database Publishing Unit (BNA)
 BNA Video Group (BNA)
 BNA's Research & Special Projects Div. (BNA)
 Bobbs-Merrill (ITT)

* For a description of the information services offered by these companies, see Information Industry Association, *Information Sources 1984* (1984).

A2

R.R. Bowker Company (Xerox)
 Bowne & Company
 Broadcast Advertisers Reports (SFN)
 BUC Information Services
 The Bureau of National Affairs, Inc.
 Burrelle's Information Search Service
 Business International Corporation

 Callaghan & Company (Int'l Thom)
 Cambridge Research Institute
 Cambridge Scientific Abstracts (Disclosure)
 Capitol Services, Inc. (ITG)
 Carrollton Press, Inc. (Int'l Thom)
 Chase Econometrics/IDC
 The Chronicle of Higher Education
 Citishare Information Services
 Clark Boardman Company Ltd. (Int'l Thom)
 C.N.R.S. Centre de Doc. Sci. et Technique
 COADE (Int'l Thom)
 Commodity News Services, Inc. (K-R)
 Compusearch Market & Social Research Ltd.
 Congressional Information Service, Inc. (Elsevier)
 Cordatum Inc.
 Cordura Publications, Inc.
 Creative Strategies International (Bus. Int'l)
 Credit Bureau (Equifax)
 Cuadra Associates
 Cultural Services, Inc.

 D & B Computing Services (D&B)
 DATA BASE USER SERVICE
 Data Courier Inc.
 Data-Ease
 Data Resources, Inc. (McGraw-Hill)
 Database (Hong Kong)
 Database Services
 Datapro Research Corp. (McGraw-Hill)
 Dataquest (Nielsen)
 Datasolve Database Information Service

A3

Derwent, Inc.
 Dialcom International, Inc. (ITT)
 DIALOG Information Services, Inc.
 Directory (SNET)
 Disclosure Incorporated
 F.W. Dodge Division (McGraw-Hill)
 Donnelley Marketing (D&B)
 Dow Jones & Company, Inc.
 Dowden Communications
 Dun & Bradstreet Canada Limited (D&B)
 The Dun & Bradstreet Corporation
 Dun & Bradstreet Credit Services (D&B)
 Dun & Bradstreet International (D&B)
 Dun & Bradstreet Operations (D&B)
 Dun's Marketing Services (D&B)
 DunsNet (D&B)

 The Economist Publications & Data Services, USA
 EIC/Intelligence Inc.
 Elsevier Publishing (Elsevier)
 Elsevier U. S. Holdings, Inc.
 Equatorial Communication Services
 Equifax Ctr for Info. Research (Equifax)
 Equifax Inc.
 Ergosyst Associates, Inc.
 Excerpta Medica (Elsevier)
 Exporters Encyclopaedia (D&B)
 EXSHARE, Extel Computing Limited

 Faxon Network Services
 FIND/SVP
 Fisher-Stevens, Inc. (BNA)
 Focus Research Systems, Inc. (D&B)
 France Telecom Inc.
 Frost & Sullivan, Inc.

 Gale Research Company
 Gartner Group
 Gateway Systems Inc.
 Global Engineering Documents (ITG)

A4

Government Counselling Ltd.
 Greenwood Press (Elsevier)
 Gregg Corporation
 Grolier Electronic Publishing, Inc.
 Group L Corporation
 GTE Telenet Comm. Network Applications
 G.K. Hall (ITT)
 Haney Group, Inc.
 Harris Information Services
 Harte-Hanks Interactive Services
 Healthcare Info. Services Div. (McGraw-Hill)
 Houghton-Mifflin Reference Div.
 ICOR Information Systems
 INACOM International (Int'l Thom)
 Info Globe
 Informatics Information Systems & Services
 Information Access Company (Ziff-Davis)
 Information Consultants, Inc.
 Information Handling Services (ITG)
 Information Industries Ltd. (ITG)
 Information Market Indicators
 Information Marketing International (Ziff)
 Information on Demand, Inc.
 Information Researchers, Inc.
 The Information Store
 INFOSOURCE, Inc.
 INMAGIC INC
 Institute for Scientific Information
 InterDigital, Incorporated
 International Business Machines Corporation
 International Data Corporation
 International Development Center
 International Thomson Business Press, Inc.
 International Thomson Holdings
 International Thomson Information Inc.
 Intertec (ITG)
 ITG, Inc.

A5

ITG, Inc., International Division
 ITT Communications and Info. Services, Inc.
 ITT Educational Services
 ITT Publishing
 ITT World Communications Inc.
 ITT World Directories
 Kalba Bowen Associates Inc.
 KEYCOM Electronic Publishing
 KLUWER
 LaserData, Inc.
 Learned Information, Inc.
 Legi-Slate (Washington Post)
 The Lifestyle Selector (Nat'l Demographics)
 LINC Resources Inc.
 LINK Resources Corporation (Int'l Data)
 Longman Inc.
 Rufus S. Lusk & Son, Inc.
 Management Contents (Ziff)
 Maritime Data Network, Ltd.
 Market Information Inc.
 Marquis Who's Who Inc. (ITT)
 McGraw-Hill Book Company
 McGraw-Hill Broadcasting Company, Inc.
 McGraw-Hill, Inc.
 McGraw-Hill Information Systems Company
 McGraw-Hill International Book Company
 McGraw-Hill Publications Company
 Mead Data Central
 Meckler Publishing
 Media General, Inc.
 MEKAN Information Analysis Center
 Menlo Corporation
 Meredith Corporation
 Metrics Research Corporation
 Michie Company (ITT)
 MindScape, Inc. (SFN)
 MIW Associates

A6

Mnemos
 Modern Imaging
 Moody's Investors Service (D&B)
 Moore Data Management Services
 MultiList Inc. (Real Estate Data)

 National Decision Systems
 National Demographics Ltd.
 National Management Systems
 National Planning Data Corporation
 National Standards Assoc. (Disclosure)
 NDX Corporation
 NERAC
 Network Marketing (SNET)
 The New York Law Publishing Company (SFN)
 The New York Times Syndicated Sales
 Newport Associates
 NewsBank, Inc.
 Newsday Videotex Services (Times Mirror)
 NewsNet, Inc.
 Newsweek (Washington Post)
 Nielsen Business Services

 Occupational Health Services
 Ohio Real Estate Services, Inc.
 One Point Inc./Int'l Telemarketing
 The Oryx Press

 PageAmerica Group, Inc.
 Participation Systems Incorporated
 Pergamon International Information Corp.
 Petroleum Information (Nielsen)
 Pharmaco-Medical Documentation
 Phillips Publishing Publications Group
 Port Import/Export Reporting Service (K-R)
 Post-Newsweek Stations (Washington Post)
 Predicasts (ITG)
 Prentice-Hall, Inc.
 PsycINFO

A7

Questel, Inc.
 Quotron Systems, Inc.

 Readex Microprint (NewsBank)
 Real Estate Data, Inc.
 Reed Telepublishing
 Reference Technology Inc.
 Research One
 Research & Review Service of America (ITT)
 Research Publications (Int'l Thom)
 RFP, Inc.

 Howard W. Sams Company (ITT)
 Sanoma-International
 Scott, Foresman and Company (SFN)
 SDC Information Services
 Seibt Verlag GmbH (ITG)
 SFN Companies, Inc.
 I.P. Sharp Associates
 Shepard's (McGraw-Hill)
 Silver Burdett Company (SFN)
 Sogitec Incorporated
 Solution Associates, Inc.
 SONECOR Systems (SNET)
 Source Telecomputing Corporation
 South-Western Publishing Company (SFN)
 Southern New England Telephone (SNET)
 SPNB California Databank
 SRDS Media Plan Management Services
 Standard & Poor's Corporation (McGraw-Hill)
 States News Service
 Storage Research Pty, Ltd.
 Strategic Information (Ziff)
 Sweet's Division (McGraw-Hill)

 Tax Management, Incorporated (BNA)
 Technical Indexes Ltd. (ITG)
 Technical Insights, Inc.
 Telerate Systems Incorporated
 Telesensory Systems Enabling Technology Group

Texas Instruments Incorporated
Thomas Register of American Manufacturers
Thomson & Thomson (Int'l Thom)
Tijl Datapress b.v.
Time Magazine Group
Times Mirror Videotex Services (Times Mirror)
Times On-Line Services, Inc. (NY Times)
TRINET
TRINTEX—A CBS/IBM/Sears Co.
TRW Information Services Division

UNIPUB (Xerox)
University Microfilms Int'l (Xerox)
University Park Press (SFN)
U.S. Transmission Systems, Inc. (ITT)
USACO Corporation

Van Nostrand Reinhold Company, Inc. (Int'l Thom)
Veronis, Suhler & Associates Inc.
VideoLog Communications
Viewdata Corporation of America, Inc. (K-R)
VNU Amvest, Incorporated
VU/TEXT Information Services, Inc. (K-R)

Warner-Eddison Associates, Inc.
The Washington Post Company
West Indies Advertising Company, Inc.
Western Union FYI News Service
WESTLAW
John Wiley & Sons, Inc.
H. Donald Wilson Inc.

Xerox Computer Services
Xerox Information Resources Group

Year Book Medical Publishers, Inc. (Times Mirror)